

The Gang's All Here: Evaluating the Need for a National Gang Database

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Street gangs in American cities are increasingly associated with violent crime, drugs and other problems. In the past decade, legislators have attempted to enact comprehensive federal gang legislation that would include a national database to assist law enforcement agencies in tracking known and suspected gang members. This Note examines the need for and the risks of federal consolidation of such data, through a critique of existing criminal databases. While acknowledging the potential utility of monitoring gang trends at the federal level, the discussion concludes by urging lawmakers to reconsider proposals that would consolidate existing state and local databases. A better approach would include federal action to aid and improve intelligence gathering at the local level but limit the use and dissemination of such data by federal law enforcement and prosecutors. The changes recommended in this Note are designed to improve the quality and utility of gang databases while simultaneously safeguarding individual rights.

I. INTRODUCTION

Local anti-gang units and task forces have proliferated throughout the United States in the past twenty years, based on the belief that street gangs are criminal organizations that should be tracked and combated by law enforcement.¹ Local and federal governments have spent billions of dollars in efforts to

* Writing & Research Editor, COLUM J.L. SOC. PROBS., 2008–2009. The author thanks Professor Daniel Richman and the *Journal* staff for their guidance and editorial assistance.

1. Charles M. Katz, *Issues in the Production and Dissemination of Gang Statistics: An Ethnographic Study of a Large Midwestern Police Gang Unit*, 49 CRIME & DELINQ. 485, 485 (2003).

investigate and prosecute violent crime and other gang offenses.² Gang databases, and criminal databases generally, are increasingly used by law enforcement to track individuals and measure local criminal activity.³

Adolescents between the ages of 12 and 15 are most likely to join a gang due to a combination of familial, social and environmental risk factors.⁴ While the presence of street gangs in many American cities has been documented, the extent of the gang problem is a matter of dispute.⁵ This lack of clarity may be due in part to difficulties in discerning an individual's status within a gang, which can range from "wannabe," typically a younger person seeking approval and recognition from peers, to an "original gangster," the most violent and established members of these organizations.⁶ Researchers point out that shifting statistics on the level of gang membership may actually be a response to changing definitions of "gangs" or "gang-related crimes," rather than rising or falling crime levels.⁷

Local and national politicians, however, continue to cite gangs as a major source of violent crime. Similarly, media coverage of gang-related incidents has increased since the year 2000. The image of the gangster is romanticized to sell music and movies, while politicians and news media appeal to these images when talking about the gang problem in America. Though not all cultural conceptions of the American street gang are false, many view the current anti-gang movement as a moral panic that ulti-

2. Judith Greene & Kevin Pranis, JUST. POL'Y INST., GANG WARS: THE FAILURE OF ENFORCEMENT TACTICS AND THE NEED FOR EFFECTIVE PUBLIC SAFETY STRATEGIES 3 (2007) [hereinafter "GANG WARS"], available at http://www.justicepolicy.org/images/upload/07-07_REP_GangWars_GC-PS-AC-JJ.pdf.

3. Charles M. Katz, Vincent J. Webb & David R. Schaeffer, *The Validity of Police Gang Intelligence Lists: Examining Differences in Delinquency Between Documented Gang Members and Nondocumented Delinquent Youth*, 3 POLICE Q. 413, 413-14 (2000).

4. GANG WARS, *supra* note 2, at 33, 45-46.

5. Recent surveys of gang activity reveal stark inconsistencies in reported levels of crime and membership. *Id.* at 55 (showing huge inconsistencies in reported levels of crime and in reported gender and race of gang members — arguing that gang data should be taken with "fistfuls of salt"); *But see* NATIONAL ASSOCIATION OF GANG INVESTIGATORS ASSOCIATIONS (NAGIA), 2005 NATIONAL GANG THREAT ASSESSMENT v-vi (2005) [hereinafter "NAGIA REPORT"], available at http://www.ojp.usdoj.gov/BJA/what/2005_threat_assesment.pdf (reporting some consistent national and regional trends).

6. LEWIS YABLONSKY, GANGSTERS: FIFTY YEARS OF MADNESS, DRUGS AND DEATH ON THE STREETS OF AMERICA, 57-62 (1997).

7. GANG WARS, *supra* note 2, at 3-4.

mately teaches the public to fear minority populations and support heavy-handed law enforcement tactics.⁸

There are fierce disagreements over the best way to reduce violent crime.⁹ Civil rights activists and scholars have argued that targeting gangs does little to decrease rates of actual crime. Even assuming that reducing gang activity prevents violence and other crime,¹⁰ the question of how to target gangs remains. Anti-gang measures typically fall under one of three categories: prevention, intervention, or suppression. Though prevention and intervention are proven effective at reducing gang activity,¹¹ the majority of funds and legislation are targeted at suppression, providing grants and directives to law enforcement agencies.¹² Comparisons of gang suppression activities and crimes rates in six selected localities actually show divergent trends.¹³ Nonetheless, anti-gang task forces and suppression legislation continue to be the most popular tactics nationwide.¹⁴

8. *Id.* at 3; Beth Bjerregaard, *Antigang Legislation and Its Potential Impact: The Promises and the Pitfalls*, 14 CRIM. JUST. POL'Y REV. 171, 174–78 (2003); Majorie Zatz, *Chicano Youth Gangs and Crime: The Creation of a Moral Panic*, 11 CONTEMP. CRISES 129 (1987).

9. See generally, NATIONAL INSTITUTE OF JUSTICE (NIJ), RESPONDING TO GANGS: EVALUATION AND RESEARCH, (Winifred L. Reed & Scott H. Decker, eds., 2002), available at <http://www.ncjrs.gov/pdffiles1/nij/190351.pdf>.

10. For purposes of this note, I assume some statistical correlation between gang membership and violent crime in a given locality. Definitions and criteria for defining gang activity, discussed in Parts III and IV, *infra*, play a large role in determining the extent of this connection. For example, legislation that identifies gang members by appearance and associates would weaken the correlation.

11. For more on the effectiveness of early prevention and intervention, see Karl G. Hill et al., *Early Precursors of Gang Membership: A Study of Seattle Youth*, in JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Washington, D.C., Dec. 2001), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/190106.pdf>; *Gang Deterrence and Community Protection Act of 2005: Hearing on H.R. 1279 Before the Subcomm. on Crime, Terrorism, and Homeland Sec.*, 109th Cong. 3–5 (2005) (statement of Rep. Robert Scott, Member, House Comm. on the Judiciary).

12. Bjerregaard, *supra* note 8, at 172. Of approximately \$1.1 billion allocated in the GAP Act, about \$40 million will go to organizations promoting gang prevention and innovation programs. CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE: S. 456 GANG ABATEMENT AND PREVENTION ACT OF 2007, at 3 (July 2, 2007), available at <http://www.cbo.gov/ftpdocs/82xx/doc8294/s456.pdf>.

13. GANG WARS, *supra* note 2, at 64.

14. Scott H. Decker, *A Decade of Gang Research: Findings of the National Institute of Justice Gang Portfolio*, in RESPONDING TO GANGS: EVALUATION AND RESEARCH 2, 3–4 (Winifred L. Reed & Scott H. Decker, eds. 2002), available at <http://www.ncjrs.gov/pdffiles1/nij/190351.pdf>.

Recent years have seen several efforts to enact federal legislation targeting the nation's gang problem.¹⁵ The Gang Abatement and Prevention ("GAP") Act of 2007, sponsored by Sen. Dianne Feinstein (D-CA), recently passed the Senate by unanimous consent¹⁶ and was recently reintroduced in the 111th Congress after it stalled in the House of Representatives in 2008.¹⁷ Two similar measures have been introduced in the House.¹⁸ Among the GAP Act's many provisions is a section directing the Attorney General to create a federally funded "National Gang Activity Database" to disseminate information to law enforcement agencies about gang activities and gang members.¹⁹

Gang databases, which collect information on local gang activity, are generally created to assist suppression activities by law enforcement agencies and prosecutors.²⁰ Current databases are flawed due to the use of inconsistent definitions, improper documentation procedures, and inadequate review.²¹ If policies created through the federal gang legislation are to facilitate intelligence gathering, they must recognize and remedy these shortcomings.

15. See, e.g., Gang Deterrence and Community Protection Act of 2005, H.R. 1279, 109th Cong. (2005) (introduced by Rep. J. Randy Forbes (VA)); Gang Prevention and Effective Deterrence Act of 2003, S. 1735, 108th Cong. (2003) (introduced by Sen. Orrin Hatch (UT)).

16. Gang Abatement and Community Protection Act of 2007, S. 456, 110th Cong. (2007) (introduced by Sen. Dianne Feinstein (CA), as passed by Senate on Sept. 21, 2007, referred on Oct. 17, 2007 as H.R. 1582 to Subcomm. on Healthy Families and Cmty.). Reports indicate that the bill had a "chilly reception" in the House. Lisa Friedman, *Bill on Gangs Draws Split*, KNOW GANGS, Oct. 7, 2007, <http://www.knowgangs.com/news/oct07/0301.php> (last visited Jan. 30, 2009).

17. S. 132, 111th Cong. (2009), referred on Jan. 6, 2009 to the Senate Committee on the Judiciary.

18. H.R. 3922, 110th Cong. (2007) (introduced by Rep. Vern Buchanan (FL)) (referred on Nov. 14, 2007 to Subcomm. on Healthy Families and Cmty.); H.R. 3846, 110th Cong. (2007) (introduced by Rep. Bobby Scott (VA), "[t]o provide for evidence-based and promising practices related to juvenile delinquency and criminal street gang activity prevention and intervention to help build individual, family, and community strength and resiliency to ensure that youth lead productive, safe, healthy, gang-free, and law-abiding lives") (referred on Nov. 2, 2007 to Subcomm. on Crime, Terrorism, and Homeland Sec.).

19. S. 132 § 304(b). Rep. Buchanan's bill also provides funding for national coordination of gang databases, but language in the bill is far less detailed. See H.R. 3922 § 7(a)(6).

20. GANG WARS, *supra* note 2, at 6; Katz, Webb & Schaeffer, *supra* note 3, at 416; Anthony A. Braga & David M. Kennedy, *Reducing Gang Violence in Boston*, in RESPONDING TO GANGS: EVALUATION AND RESEARCH 265, 279 (Winifred L. Reed & Scott H. Decker, eds. 2002), available at <http://www.ncjrs.gov/pdffiles1/nij/190351.pdf>.

21. See *infra* Part IV.

Part II of this Note provides an overview of criminal databases and their intended uses, including a brief discussion of changes to intelligence gathering post-9/11. This Part looks at gang databases and the documentation process through which law enforcement tracks incidents and individuals. Part III provides an analysis of existing federal anti-gang efforts, including legislation and database collaborations. This Part discusses potential difficulties with the proposal in the GAP Act for a National Gang Activity Database, which would aggregate local database contents at the national level. Part IV examines current implementation and uses of gang databases in local jurisdictions. This Part addresses Constitutional and other legal implications of gang databases for both law enforcement institutions and individuals.

Part V proposes an alternative model for federal involvement, which would aim to improve local standards rather than magnifying existing problems on a greater scale. This proposed model, which has a structure similar to other federal criminal justice programs, includes substantive suggestions for future federal guidelines and reform in gang intelligence gathering. Rather than creating a central database from existing, but flawed, gang data, federal funds should be employed to research and develop more effective ways to track gang members. These guidelines should relate to three aspects of gang intelligence gathering: definitions, notice, and documentation procedures. Federal funding and oversight can improve information sharing and uniformity across jurisdictions while allowing state and local actors to control training and implementation. Once improved, database contents can also be used to support prevention and intervention programs in addition to law enforcement agencies. Finally, this Note concludes with recommendations for immediate next steps and future research in gang prevention.

II. CRIMINAL DATABASES AND THE DOCUMENTATION PROCESS

The use of criminal databases by law enforcement is not unique to gang problems. This Part briefly discusses criminal databases, including two recent and controversial examples, and the documentation processes by which such databases are populated. Next, this Part provides details of local anti-gang initia-

tives and the reasons they employ gang databases. Finally, this Part analyzes procedures and criteria used in gang database documentation.

A. CRIMINAL DATABASES

In recent decades, and particularly post-9/11, law enforcement and intelligence experts have stressed the need to collect and disseminate data on criminal activity.²² These officials regard intelligence gathering as crucial to ensuring public safety and homeland security.²³ Local agencies hope to establish more effective and efficient suppression tactics through information sharing with other departments in a given region. Increased awareness about trends in criminal activity, greater knowledge about best practices, and improved resource allocation are all thought to help police prevent and suppress crime.²⁴

In addition to gangs, criminal databases are used to track sex offenders and suspected terrorists. The Adam Walsh Act expanded the federal sex offender database and made this information available to the public.²⁵ Critics charge that the database is over-inclusive, often listing people whose crimes occurred decades ago or when they were juveniles, and they worry that publicly exposing offenders hinders rehabilitation and gives rise to ha-

22. The National Criminal Intelligence Sharing Plan was created in 2003 to “provide law enforcement agencies with the ability to gather, analyze, protect, and share credible and timely information and intelligence to identify, investigate, prevent, deter, and defeat criminal and terrorist activities, both domestically and internationally, as well as protect the security of our homeland and preserve the rights and freedoms of all Americans.” GLOBAL JUSTICE INFORMATION SHARING INITIATIVE, UNITED STATES DEPARTMENT OF JUSTICE, THE NATIONAL CRIMINAL INTELLIGENCE SHARING PLAN 3 (2003) [hereinafter “NCISP”], available at <http://www.fas.org/irp/agency/doj/ncisp.pdf>. At least 20 federal, state and local agencies are involved in implementation of the NCISP. *Id.*

23. “Providing local agencies with the tools and resources necessary for developing, gathering, accessing, receiving, and sharing intelligence information is critically important to improving public safety and homeland security.” *Id.*

24. See NAGIA REPORT, *supra* note 5, at 15–16; NCISP, *supra* note 22, at iii, 3; Press Release, White House Office of the Press Secretary, Fact Sheet: The Adam Walsh Child Protection and Safety Act of 2006 (July 27, 2006), <http://www.whitehouse.gov/news/releases/2006/07/20060727-7.html> [hereinafter “Adam Walsh Fact Sheet”] (last visited Dec. 22, 2008).

25. Adam Walsh Act, Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified as amended in scattered sections of 42 U.S.C.).

rassment from other community members.²⁶ On the other hand, proponents of the expanded sex offender registry point to high rates of recidivism among sex offenders and argue that the need to protect children outweighs the inconvenience and embarrassment of public scrutiny.²⁷ There are strong arguments on both sides of this debate. What is primarily noteworthy for purposes of this Note is that individuals must be charged and convicted of a sexual offense in order to be added to the sex offender registry, while an individual can be added to a gang database without ever having been charged or convicted of a crime.²⁸ Furthermore, convicted sex offenders are required to register themselves upon relocating to a new neighborhood, thus providing notice of their documentation.²⁹

The terrorist suspect databases, which have been employed increasingly since 9/11, are even more controversial.³⁰ The Terrorist Identities Datamart Environment (“TIDE”), a centralized list compiling information from such actors as the National Security Agency (“NSA”), FBI and CIA, was created in 2004 and is maintained by the National Counterterrorism Center.³¹ The database contains more than 540,000 names of people suspected of involvement in terrorist activities, and documentation may result in denial of a visa or entry to the United States, placement on a no-fly list or targeting for pretextual prosecutions.³² Given the sensitivity of national security concerns, the process by which

26. See Memorandum from Amy Baron-Evans & Sara E. Noonan to Federal Defenders, Adam Walsh Act – Part II (Sex Offender Registration and Notification Act) (Nov. 20, 2006), available at http://www.fd.org/pdf_lib/adam%20walsh%20part%20ii.pdf; HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US (Sept. 2007), available at <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf>.

27. See Adam Walsh Fact Sheet, *supra* note 24; Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES OF SOC. ISSUES AND PUB. POL’Y 1 (2007) (criticizing common beliefs about sex offenders).

28. Adam Walsh Act, § 111(1).

29. Adam Walsh Act, § 113.

30. See, e.g., NATIONAL COUNTERTERRORISM CENTER, NCTC AND INFORMATION SHARING – FIVE YEARS SINCE 9/11: A PROGRESS REPORT 3 (2006) [hereinafter “NCTC REPORT CARD”], available at http://www.nctc.gov/docs/report_card_final.pdf; NCISP, *supra* note 22.

31. Walter Pincus & Dan Eggen, *325,000 Names on Terror List*, WASH. POST, Feb. 15, 2006 at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/14/AR2006021402125.html>.

32. National Counterterrorism Center, Terrorist Identities Datamart Environment (“TIDE”), http://www.nctc.gov/docs/Tide_Fact_Sheet.pdf (last visited Jan. 19, 2009); Pincus & Eggen, *supra* note 31.

names are collected, retained and disseminated remains highly secretive.³³

The process by which criminal databases are populated, termed “documentation”, varies and may be highly controversial depending on the content and purpose of the database. Criteria can be very subjective and the consequences for an individual may be severe. Given these problems, and the questionable correlation between database-keeping and lower crime rates, many dispute the need for databases where risks to individual rights may outweigh utility.³⁴

B. GANG DATABASES: STATE AND LOCAL TRENDS

Over the past two decades, gang databases, along with the law enforcement units and task forces that support them, have become commonplace in states and cities throughout the United States.³⁵ Anti-gang units first began to appear in the 1950s and 60s in response to growing concerns over gang presence and violent crime in major cities, such as New York, Chicago and Los Angeles.³⁶ The units, created to “collect and disseminate data on gangs, gang members and gang-related activity,”³⁷ are present in roughly “1 in 4 [jurisdictions] with a gang problem . . . including 51 percent of larger cities” and most of these units gather intelligence on gang activity in one form or another.³⁸ Due to increased federal participation in fighting violent crime, particularly in the

33. Karen DeYoung, *Terror Database Has Quadrupled in Four Years: U.S. Watch Lists Are Drawn from Massive Clearinghouse*, WASH. POST, Mar. 25, 2007, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/24/AR2007032400944.html>.

34. See generally, GANG WARS, *supra* note 2; Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California’s Anti-Gang Step Act*, 11 BERKELEY J. CRIM. L. 101 (2006); Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 115 (2005).

35. GANG WARS, *supra* note 2, at 69. Some jurisdictions have also developed special gang prosecution units. Regardless of whether there is a specialized unit, prosecutors use database information to strengthen cases against known or suspected gang members. Bjerregaard, *supra* note 8, at 172–4. For additional discussion of prosecutors’ roles, see *infra* Part IV.

36. GANG WARS, *supra* note 2, at 12–14.

37. Katz, *supra* note 1, at 485.

38. National Youth Gang Center, *National Youth Gang Survey Analysis (2007)*, <http://www.iir.com/nygc/nygsa/>. See *infra* Part III (discussing intelligence gathering procedures).

1980s and 90s, initiatives often involve cooperation of federal, state and local agencies.³⁹ They may also be undertaken as joint efforts with drug or gun task forces in a given jurisdiction.⁴⁰ The proliferation of gang databases demonstrates a growing consensus that “if it walks, talks and acts like a gang member, it is a gang member.”⁴¹

Gang tracking systems can be used for a variety of purposes, including to (i) identify offenders and suspects, (ii) gauge the nature and extent of a local gang problem, (iii) evaluate effectiveness of police programs, (iv) examine regional and national trends, and (v) make policy decisions regarding resource allocation and funding.⁴² Los Angeles, a city widely known for its gang problems, was the first to implement a database in 1987. The names and structures of gang databases vary among localities, but most implement some version of available generic software.⁴³ There are also several federally-funded database collaborations already in place, discussed in Part III.

Studies of gang databases have examined adequacy of definitions,⁴⁴ documentation procedures, and administrative review.⁴⁵

39. See Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 393–400 (2006). For example, the FBI's Safe Streets and Gang Unit administers 131 Violent Gang Safe Streets Task Forces and eight Violent Crime/Gang Safe Streets Task Forces nationwide. Federal Bureau of Investigation, Violent Gang Task Forces, <http://www.fbi.gov/hq/cid/ngic/natgangtfs.htm> (last visited Dec. 22, 2008). The Department of Justice also has partnerships with at least six cities. See *infra* Part V.

40. Recent examples include San Diego's JUDGE program, which focused on drugs and gangs, and Boston's Project Ceasefire, which focuses on guns and gangs. See generally Ronnie Melton & Susan Pennell, *Evaluation of a Task Force Approach to Gangs*, in RESPONDING TO GANGS: EVALUATION AND RESEARCH 197 (Winifred L. Reed & Scott H. Decker, eds., 2002), available at <http://www.ncjrs.gov/pdffiles1/nij/190351.pdf>; Braga & Kennedy, *supra* note 20.

41. Paul Kirby, *Intelligence-Gathering Helps Police Fight Gang Activity*, DAILY FREEMAN, Nov. 12, 2007, available at <http://www.dailyfreeman.com/articles/2007/11/12/top%20stories/19014231.txt> (quoting Detective Bob Henry of Kingston, New York, touting benefits of the local law enforcement gang database).

42. Katz, *supra* note 1, at 485.

43. For example, GangNet[®] is currently being used in 12 states, the District of Columbia, multiple federal agencies, and in Canada. SRA INTERNATIONAL, INC., WHITE PAPER TASK FORCE[®] GANGNET[®] SOFTWARE 2 (2008), <http://www.sra.com/media/gangnet/gangnet-whitepaper-2008.pdf> (last visited Jan. 30, 2009).

44. Definitions of “gangs” or “gang-related crime” may be based on official written policy or, as some studies have found, socially-constructed notions of what constitutes a gang. Katz, *supra* note 1, at 489.

45. Katz, *supra* note 1, at 486–89 (providing a firsthand look at gang documentation and suppression efforts in an anonymous Midwestern city through interviews with law

Due to inconsistencies and general lack of awareness about protocol, gang data may be unreliable and subject to distortion for political or financial gain.⁴⁶ Furthermore, it is not clear that documented gang members commit more crimes, or more serious crimes, than their non-documented counterparts.⁴⁷ Given all of these concerns, it is unclear whether the heavy investment in gang suppression has been worth the cost.⁴⁸

C. GANG DATABASES: DOCUMENTATION

The successful use of any criminal database hinges on the adequacy of procedures and criteria used to populate it. For purposes of this discussion, gang documentation processes are grouped into two general categories, termed “incident-based” and “individual” documentation. Incident-based documentation is initiated in the course of a criminal investigation and focuses on various aspects of the event itself to assess trends and improve anti-gang measures. Individual documentation, on the other hand, tracks known or suspected gang members and is used for a range of purposes, including identifying subsequent gang crimes and increased mandatory sentences. While it is rare for a database to fall neatly within either category, it is important to see how the implications of these two forms differ.

To illustrate these two methods, this section will focus on a handful of established and well-documented state and local databases. The risks and consequences of documentation policies are discussed in Part IV.

enforcement officials, review of statistical data and analysis of documentation and review procedures).

46. *Id.*

47. Katz, Webb & Schaeffer, *supra* note 3, at 416–17. One study, of the Mesa, AZ, gang task force, did find a correlation between documentation and criminal behavior. *Id.* at 431–32.

48. See generally GANG WARS, *supra* note 2; Katz, *supra* note 1; Jeffrey A. Kidder, *Gang Deterrence and the Community Protection Act of 2005: Why the Federal Response to MS-13 is Flawed and How it Will Have an Adverse Impact on Your State*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 639 (2007). See also THE ADVANCEMENT PROJECT, CITYWIDE GANG ACTIVITY REDUCTION STRATEGY: PHASE III REPORT (2006), http://www.advanceproj.org/doc/p3_report.pdf (last visited Dec. 22, 2008) (arguing that California has spent more on gang suppression than any other state and continues to experience serious and growing rates of gang-related crime).

1. Incident-Based Documentation

Incident-based documentation tracks data on gang crimes committed in a given region.⁴⁹ Facing rising gang activity in the 1990s, Orange County implemented the Gang Incident Tracking System (“GITS”), which tracked gang activity at the regional level.⁵⁰ Researchers at the University of California, Irvine, conducted a study on the accuracy and utility of GITS in reporting, understanding, and preventing gang crime. Results of the study showed that, while there was potential for some underreporting of incidents, the database was very useful in understanding the “spatial and temporal distribution of gang activity.”⁵¹ Given the availability of research and evaluation, this section uses Orange County’s approach as a primary basis for describing incident-based documentation.⁵²

a. Process

Under GITS, all local law enforcement agencies in Orange County were responsible for tracking gang-related crime and reporting incidents to a centralized database. Patrol officers, who submit field incident reports in the course of their daily work, were asked to indicate on these reports when they believed an event was gang-related. Officers were given specific definitions and criteria for identifying a gang crime and were asked to include information such as geographic location, type of crime, weapons used, relationship to victim, and other factors involved,

49. So defined for purposes of this Note.

50. As of 2001, GITS has been incorporated as part of the “Orange County node” of Calgang, a statewide database discussed in the next section. Scott H. Decker, *Strategies to Address Gang Crime: A Guidebook for Local Law Enforcement*, <http://www.cops.usdoj.gov/files/RIC/Publications/e060810142Gang-book-web.txt> (last visited Jan. 30, 2009). Studies and data on GITS focus on pre-2001 work and are most useful for understanding the distinctions between incident-based and individual documentation.

51. James W. Meeker et al., *Developing a GIS-Based Regional Gang Incident Tracking System*, in *RESPONDING TO GANGS: EVALUATION AND RESEARCH* 289, 291 (Winifred L. Reed & Scott H. Decker, eds., 2002), available at <http://www.ncjrs.gov/pdffiles1/nij/190351.pdf>. GITS was one of several anti-gang measures implemented in southern California during this period. As discussed in Part III.B, other databases focused more on individual behavior and posed greater risks of inaccuracy and overreaching.

52. The San Diego and Boston programs are also mentioned briefly. See Melton & Pennell, *supra* note 40.

such as drugs or weapons.⁵³ All reports, gang-related or not, were then reviewed by a person within the officer's reporting division to determine whether the incident should be reported to GITS. Reports submitted to GITS were screened for completeness and accuracy, and any forms failing the screening would be returned to the department where they originated for correction.⁵⁴

b. Criteria

GITS criteria for identifying a "gang-related" crime were taken directly from the California Street Terrorism Enforcement and Prevention ("STEP") Act.⁵⁵ Under this legislation, a gang-related crime meets one of the following criteria: "(i) a suspect or suspects are identified as gang members or admit membership in a gang; (ii) a person becomes a victim due to his or her gang association, (iii) a reliable informant identifies an incident as gang activity; (iv) an informant of previously untested reliability identifies an incident as gang activity, and this identification is corroborated by other independent information."⁵⁶ These criteria exemplify the "gang-involved model", which was first used in Los Angeles. The model defines gang crimes "based on the assumption that 'the character of an individual as a gang member, regardless of the types of criminal situations in which he or she is found', is what is important for defining gang crime."⁵⁷

By contrast, a "gang-motivated model," such as that used in Chicago, identifies crimes motivated by retaliation, territory-marking, recruiting or representing gang interests.⁵⁸ Both models present flaws in practice.⁵⁹ Under the gang-motivated model, law enforcement officials may have a hard time figuring out the impetus for a crime, leading to under-inclusiveness and guesswork. Some research favors the gang-involved model, which

53. Meeker et al., *supra* note 51, at 297; *see infra* Part III.A.2.

54. Meeker et al., *supra* note 51, at 302.

55. CAL. PENAL CODE §§ 186.20-186.33 (West 2006).

56. Meeker et al., *supra* note 51, at 295.

57. *Id.*

58. *Id.* at 296.

59. Two other studies have examined collection models based on similar distinctions – "member-based" vs. "motive-based" crimes. *See* GANG WARS, *supra* note 2, at 51–52; Malcolm Klein & Cheryl Maxson, *Defining Gang Homicide: An Updated Look at Member and Motive Approaches*, in THE MODERN GANG READER (Klein et al. eds., 2d ed. 2001).

avoids these concerns and tends to encompass gang-motivated crimes.⁶⁰ On the other hand, the gang-involved model poses many of the same risks of individual documentation, such as stereotyping, subjectivity and over-inclusiveness.⁶¹

2. *Individual Documentation*

Individual documentation records information about people who are known or suspected to be in a gang.⁶² The process is far more subjective than incident-based documentation techniques, because officers initiate contact with suspects based on a variety of factors, most of which are unrelated to criminal activity.⁶³ The oldest and most documented example, Calgang, has faced many of the criticisms leveled at criminal databases generally. The database, “an automated gang intelligence database system that provides intelligence information to assist local, state, and federal law enforcement agencies in order to solve gang related crimes,”⁶⁴ was first used in Los Angeles in the 1980s. California took the database statewide a decade later.⁶⁵

a. *Process*

Studies indicate that the majority of Calgang documentation takes place through field interviews unrelated to any specific in-

60. The advantage of collecting gang-involved (rather than gang-motivated) data is that these data give law enforcement a better idea of the types of criminal activities that gang members are committing, not only in a group setting but also individually, and allow researchers to compare gang crime with other types of crime, such as juvenile crime. Meeker et al., *supra* note 51, at 296. Perhaps the most important argument in favor of the Los Angeles model is that gang-motivated crimes can be obtained from gang-involved data but not the other way around. *Id.* From a practical standpoint, it is comparatively easy to get gang-related crime data from first reports of officers in the field, whereas the motivation behind an act is often difficult to ascertain. *Id.* Finally, people in communities with substantial gang problems tend to be more concerned about the crimes committed by gang members than about the motivation for these crimes. *Id.*

61. See *infra* Part IV.

62. So defined for purposes of this Note.

63. Katz, *supra* note 1, at 497.

64. Wright, *supra* note 34, at 119.

65. GANG WARS, *supra* note 2, at 27. Anecdotal research of news articles and legislation indicates that many other states have implemented local and regional databases, including Arizona, Colorado, Florida, Illinois, Maryland, Nevada, New York, North Carolina, North Dakota, Texas, and Virginia.

cident or investigation.⁶⁶ These interviews are conducted by patrol officers, rather than by anti-gang unit personnel who have training and experience recognizing and documenting gang members. This is because patrol officers are in the best positions to observe and interact with suspects in their regular course of duty.⁶⁷ Through consensual contact with known or suspected gang members, patrol officers interview suspected gang members, asking questions regarding “gang membership, monikers, and tattoos. Officers then record this information on the [field interview] card, along with details regarding where the stop took place, the identity of any associates, vehicles involved, schools attended, and home addresses.”⁶⁸ Cards are submitted to the gang unit for review and possible documentation.

b. Criteria

Under the STEP Act, California defines a “criminal street gang” as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more . . . criminal acts[,] . . . having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”⁶⁹ Patrol officers are told to report a suspected gang member to their department if that person meets selected criteria. In some California jurisdictions, a person can be entered into the Calgang data-

66. Such “suspicion stops,” which “generally focused on male minorities under the age of thirty and varied in duration from . . . twelve . . . to forty-one minutes,” were also documented in Las Vegas. Wright, *supra* note 34, at 121.

67. Katz, *supra* note 1, at 497.

68. Wright, *supra* note 34, at 121.

69. CAL. PENAL CODE § 186.22(e)–(f) (West 2006). The “pattern of criminal activity” is satisfied through attempt or commission of two or more of the following: assault with a deadly weapon or by means of force likely to produce great bodily injury; robbery; unlawful homicide or manslaughter; the sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances; shooting at an inhabited dwelling or occupied motor vehicle; discharging or permitting the discharge of a firearm from a motor vehicle; arson; the intimidation of witnesses and victims; grand theft; grand theft of any firearm, vehicle, trailer, or vessel; burglary; rape; looting; money laundering; kidnapping; mayhem; aggravated mayhem; torture; felony extortion; felony vandalism; carjacking; the sale, delivery, or transfer of a firearm; possession of a pistol, revolver, or other firearm capable of being concealed upon the person; threats to commit crimes resulting in death or great bodily injury; and theft and unlawful taking or driving of a vehicle.

base if he meets two of ten criteria: (i) admits gang membership or association, (ii) is observed to associate on a regular basis with known gang members, (iii) has tattoos indicating gang membership, (iv) wears gang clothing, symbols, etc., to identify with a specific gang, (v) is in a photograph with known gang members and/or using gang-related hand signs, (vi) is named on a gang document, hit list, or gang related graffiti, (vii) is identified as a gang member by a reliable source, (viii) is arrested in the company of identified gang members or associates, (ix) corresponds with known gang members or writes and/or receives correspondence about gang activities, or (x) writes about gangs (graffiti) on walls, books, paper, etc.⁷⁰ Specific requirements for documenting known or suspected gang members appear to vary according to locality.⁷¹ Interviews with patrol officers in California, however, indicate that they are less concerned with identifying gang activity given the need to respond to more immediate threats and situations. Patrol officers report relying on additional factors, such as ethnicity, geographic location and known criminal history, when deciding to conduct a field interview and fill out a card.⁷²

70. GANG WARS, *supra* note 2, at 27–8.

71. For example, in San Diego, a person can be documented if he meets three or more of nine criteria: (i) admits to being a gang member, (ii) has been arrested alone or with known gang members for offenses consistent with usual gang activity, (iii) has been identified as a gang member by a reliable informant/source, (iv) has been identified as a gang member by an untested informant, (v) has been seen affiliating with documented gang members, (vi) has been seen displaying symbols and/or hand signs, (vii) has been seen frequenting gang areas, (viii) has been seen wearing gang dress, or (ix) is known to have gang tattoos. Baker, *supra* note 34, at 110–11. By contrast, in Stanislaus County, a gang member is a person meeting two or more of eight criteria: (i) admits to being a gang member, (ii) has been arrested on suspicion of offenses consistent with usual gang activity, (iii) has been identified as a gang member by an informant, (iv) has been seen affiliating with documented gang members, (v) has been seen displaying gang symbols or hand signs, (vi) has been seen wearing gang dress or having gang paraphernalia, (vii) has gang tattoos or (viii) frequents gang areas. CITY OF SAN DIEGO POLICE DEPARTMENT, FREQUENTLY ASKED QUESTIONS REGARDING GANG DOCUMENTATION 2 (2006), available at <http://www.sandiego.gov/police/pdf/gangfaq.pdf>.

72. Katz, *supra* note 1, at 498. Additional problems with relying on patrol officers are addressed in Part IV *infra*.

III. EXISTING AND PROPOSED NATIONAL ANTI-GANG PROGRAMS

Anti-gang initiatives in this country were traditionally created and conducted at the local level.⁷³ As many suppression-based programs have failed to reduce crime, however, many state and local officials have turned to the federal government for assistance. Consequently, several federal criminal statutes and database collaborations, used to track and prosecute gang members, are currently in place. This Part provides an overview of the current federal landscape. This Part then examines the provisions of the GAP Act that increase federal funding and involvement in tracking gangs.

A. CURRENT FEDERAL EFFORTS

The landscape of existing federal legislation and programs is substantial, which calls into question the need for costly legislation to further target gangs.⁷⁴ Before any new bill is enacted, a comprehensive audit of funding and resource allocation is needed. Below is a brief attempt at sorting through these projects.

1. *Existing Federal Legislation*

Section 521 of Title 18 defines criminal offenses, circumstances and penalties relating to “Criminal Street Gangs.”⁷⁵ The section creates a 10-year sentence enhancement for certain felonies involving controlled substances, violent acts, or conspiracy to commit one of these acts, provided certain criteria are met.⁷⁶

73. See *supra* Part I.

74. The total projected cost of Senator Feinstein’s most recent gang bill is one billion dollars. Melissa Sanchez, *Sen. Murray Co-Sponsors Anti-Gang Legislation: \$1 Billion Program Calls for Intervention, Police Training for Hard-Hit Communities*, YAKIMA HERALD-REPUBLIC, Jan. 7, 2009, available at <http://www.yakima-herald.com/stories/10612>.

75. “‘Criminal street gang’ means an ongoing group, club, organization, or association of 5 or more persons — (A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (c); (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and (C) the activities of which affect interstate or foreign commerce.” 18 U.S.C. § 521(a) (2006).

76. Criminal liability is imposed under this section for a person who “(1) participates in a criminal street gang with knowledge that its members engage in or have engaged in a

Federal prosecutors have also used the Racketeer Influenced and Corrupt Organizations (“RICO”) Act to target gang activity.⁷⁷ Though the legislation was first introduced in 1970, street gang prosecutions using RICO became more popular in the early 1990s.⁷⁸ Additionally, there are at least six prevention and intervention programs targeting gang activity under Title 42 for The Public Health and Welfare. These are connected to programs targeting drugs, guns, juvenile delinquency, public safety and education programs.⁷⁹ According to Justice Department policies announced in 2006, federal law enforcement agencies have also recognized the need to “prioritize prevention programs.”⁸⁰

2. Existing Database Collaborations

Currently, there are several federally-funded databases that serve primarily to track gang activity: RISSGang, the FBI’s National Gang Intelligence Center (“NGIC”) database, and the FBI’s Violent Gang and Terrorist Organization File (“VGTOF”).

The national database proposed in the GAP Act will be coordinated by Regional Information Sharing Systems network

continuing series of offenses described in subsection (c); (2) intends to promote or further the felonious activities of the criminal street gang or maintain or increase his or her position in the gang; and (3) has been convicted within the past 5 years for — (A) an offense described in subsection (c); (B) a State offense — (i) involving a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) for which the maximum penalty is not less than 5 years’ imprisonment; or (ii) that is a felony crime of violence that has as an element the use or attempted use of physical force against the person of another; (C) any Federal or State felony offense that by its nature involves a substantial risk that physical force against the person of another may be used in the course of committing the offense; or (D) a conspiracy to commit an offense described in subparagraph (A), (B), or (C).” 18 U.S.C. § 521(d)(2006).

77. The STEP Act is styled after RICO. GANG WARS, *supra* note 2, at 26. Federal prosecutors in California, Kansas, Oklahoma, New York, Illinois, Louisiana and Rhode Island (among others) have used RICO to target gang activity. John Gibeaut, *Gang Busters: Prosecutors are Turning to Powerful Federal Statutes and Some Handy Local Ordinances to Stop Criminal Gangs in Their Tracks*, 84 A.B.A. J. 64, 65–7 (1998).

78. Gibeaut, *supra* note 77, at 65.

79. The provisions include: 42 U.S.C. § 3712 (2006) — “Weed & Seed” strategies; 42 U.S.C. § 3796dd (2006) — authority to make public safety and community policing grants; 42 U.S.C. § 5633 (2006) — federal assistance for state and local programs; 42 U.S.C. § 5651 (2006) — juvenile delinquency block grant program; 42 U.S.C. § 11801 (2006) — drug abuse education and prevention program relating to youth gangs; 42 U.S.C. § 14062 (2006) — gang investigation coordination and information collection.

80. U.S. DEPARTMENT OF JUSTICE, FACTSHEET: DEPARTMENT OF JUSTICE INITIATIVE TO COMBAT GANGS (2006), http://www.usdoj.gov/opa/pr/2006/February/06_opa_082.html (last visited Dec. 22, 2008).

(“RISSNET”),⁸¹ “a national network of six regional systems providing information-sharing in areas like gang activity, terrorism, and drug trafficking. RISSNET also provides analysis and other assistance with gang investigations. It was originally a state and local effort, but now includes national law enforcement.”⁸² RISS-Gang is the network’s regional gang database, which collects and shares information from local agencies on a voluntary basis. Participation in the RISSGang network is strongly encouraged by the National Alliance of Gang Investigators’ Associations (“NAGIA”).⁸³

The NGIC was established in 2005 and “collects, analyzes and shares data about the growth, migration and criminal activities of gangs for federal, state, local and tribal law enforcement.”⁸⁴ SRA International was recently awarded a contract to modernize and integrate the FBI’s gang intelligence systems.⁸⁵ The updated system will “integrate NGIC’s disparate components while improving connectivity, knowledge management and information sharing of gang-related intelligence.”⁸⁶ California also recently awarded a contract to integrate local databases throughout the state but elected to use another service provider, Knowledge Computing Corp. It is unclear whether the two systems will interact.⁸⁷

Another FBI database, VGTOF, “includes information on people associated with gang and terrorist activity. It is a component of the National Crime Information Center in the FBI’s Crim-

81. Gang Abatement and Community Protection Act of 2009, S. 132 111th Cong. § 304(b)(2)(A) (2009). RISS is coordinated by the Institute for Intergovernmental Research, a division of the U.S. Department of Justice’s Bureau of Justice Assistance. INSTITUTE FOR INTERGOVERNMENTAL RESEARCH, REGIONAL INFORMATION SHARING SYSTEM (RISS) (2008), <http://www.iir.com/RISS/>.

82. Stephen K. Brannon, *Cyber-Technology in Gang Cases*, 54 U.S. ATT’YS’ BULL. 29, 34 (May 2006).

83. NAGIA REPORT, *supra* note 5, at 16.

84. Mary Mosquera, *FBI seeks vendor for NGIC Gang Intelligence*, WASH. TECH., June 7, 2007, available at http://www.washingtontechnology.com/online/1_1/30795-1.html.

85. Wilson P. Dizard III, *New Systems to Help FBI and L.A. Analyze, Share Intel*, GOV’T COMPUTER NEWS, Oct. 19, 2007, available at <http://gcn.com/Articles/2007/10/19/New-systems-to-help-FBI-and-LA-analyze-share-intel.aspx>. SRA International, Inc. operates GangNet® in multiple states, federal agencies and Canada. SRA INTERNATIONAL, INC., GANGNET® (2008), <http://www.sra.com/gangnet/>.

86. Updated systems will include a capacity to interact with regional GangNet databases. Dizzard, *supra* note 85.

87. *Id.*

inal Justice Information Services Division. VGTOF is used by national, state, and local law enforcement.⁸⁸ Other immigration and terrorist databases may also be of use in tracking the most serious gangs, such as MS-13, a Salvadorian gang originating in Los Angeles that has spread throughout the United States and Central America.⁸⁹

With so many systems in place, there are risks and obstacles to information sharing at the national level. Though it appears that efforts are already underway to connect and integrate national data systems, law enforcement agencies at all levels of government may have difficulty verifying and integrating new data into their own networks.⁹⁰ There are a number of reasons to be wary of local data on gang membership and activities, and, to the extent that collaborations are already underway, law enforcement and prosecutors should proceed with caution.⁹¹

B. PROPOSALS FOR A NATIONAL GANG DATABASE

*We question the need for new laws because there are few crimes unique to gangs. Their members . . . murder, steal, sell drugs, extort money, beat up rivals and intimidate witnesses. Prosecutors . . . have successfully used federal laws to convict and imprison notorious gang members, but what's lacking is a sustained public effort to protect kids from the lure of gangs.*⁹²

Given the measures already in place, the need for additional and comprehensive federal gang legislation is unclear. Supporters of the most recent legislation hail from states and districts with poor track records on preventing and targeting gang activity.⁹³ Overwhelming support for the GAP Act in the Senate may

88. Brannon, *supra* note 82, at 34.

89. See Jennifer M. Chacon, *Whose Community Shield? Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317 (2007); Patrick O'Gilfoil Healy, *A Gang Sweep with a Difference*, N.Y. TIMES, Mar. 27, 2005, at 14LI.

90. Brannon, *supra* note 82, at 34.

91. See *infra* Part IV.

92. Op-Ed, *Think Prevention First*, BALT. SUN, Oct. 15, 2007, at 12A (criticizing GAP Act for focusing too heavily on suppression and punishment).

93. Sen. Feinstein (CA), Rep. Buchannan (FL-13); Rep. Forbes (VA-4). California and Florida ranked 1st and 4th, respectively, in a state study on increasing gang rates from 1970 through 1998. WALTER B. MILLER, *THE GROWTH OF YOUTH GANG PROBLEMS IN THE UNITED STATES: 1970-78* (U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention 2001), available at http://www.ncjrs.gov/html/ojjdp/ojjdprpt_yth_gng_prob_2001/chap9.html. For information on gang problems, specifically with MS-13 in Northern Virginia, see Washington Crime News Service, *Virginia Sees Growing Problem*

have been a result of political deal making,⁹⁴ although Senator Feinstein did pare down the legislation after colleagues expressed concern that federal prosecutors would be too actively involved in prosecuting gangs.⁹⁵ Given the failure of existing gang suppression programs in California and elsewhere, however, one wonders whether the GAP Act is simply throwing more money at bad programs.⁹⁶

Federal funding and criminal provisions in the GAP Act, though not primarily at issue here, are related to the proposed database. Local law enforcement, for example, may have an incentive to overstate gang data to qualify their jurisdiction as a High Intensity Gang Activity Area (“HIGAA”) qualified for additional federal funds.⁹⁷ The Act also broadens definitions and enhances penalties for criminal gang activity, which raises the stakes for documented individuals.⁹⁸

Under the GAP Act, the Attorney General is directed to “establish a National Gang Activity Database to be housed at and administered by the Department of Justice.”⁹⁹ The Act goes on to allocate funding to the RISS to connect existing gang information systems with the database. According to the description in the legislation, the database has four primary purposes. First, the database will be “designed to disseminate gang information to law enforcement agencies throughout the country and, subject to appropriate controls, to disseminate aggregate statistical infor-

From Gangs, CRIME CONTROL DIG., Oct. 8, 2004, available at http://findarticles.com/p/articles/mi_qa4440/is_200410/ai_n16064237.

94. Alexander Bolton, *Quick Return for Feinstein's Vote on Judge*, THE HILL, Nov. 8 2007, <http://thehill.com/leading-the-news/quick-return-for-feinsteins--vote-on-judge-2007-11-08.html>.

95. Changes include removal of gun restrictions, less stringent sentence enhancements and funding of a study on juvenile delinquency. *Id.*

96. GANG WARS, *supra* note 2, at 68–69. Criticism of the GAP Act has focused primarily on relative spending for suppression and prevention efforts. Concerns over a national database have been raised by civil rights and policy advocates but have not been central to political debates.

97. Gang Abatement and Community Protection Act of 2009, S. 132 111th Cong. § 301 (2009).

98. S.132 § 101.

99. S.132 § 304(b)(1). The bill leaves vast discretion to the Department of Justice to establish the database and determine the extent to which it would be used by federal investigators and prosecutors.

mation to other members of the criminal justice system.”¹⁰⁰ This aspect of the proposal sounds most like the GITS model.¹⁰¹

The next two provisions, however, more closely resemble a Calgang format. The national database will “contain critical information on gangs, gang members, firearms, criminal activities, vehicles, and other information useful for investigators in solving and reducing gang-related crimes.”¹⁰² Furthermore, it will:

[O]perate in a manner that enables law enforcement agencies to (i) identify gang members involved in crimes; (ii) track the movement of gangs and members throughout the region; (iii) coordinate law enforcement response to gang violence; (iv) enhance officer safety; (v) provide realistic, up-to-date figures and statistical data on gang crime and violence; (vi) forecast trends and respond accordingly; [and] (vii) more easily solve crimes and prevent violence.¹⁰³

Thus, information from the national database will be used to identify and track individual gang members.

Finally, the database will be subjected to guidelines, issued by the Attorney General, which designate “criteria for adding information to the database, the appropriate period for retention of such information, and a process for removing individuals from the database, and prohibiting disseminating gang information to any entity that is not a law enforcement agency, except aggregate statistical information where appropriate.”¹⁰⁴ This last section may partially cure concerns addressed in Part IV by limiting the use of gang intelligence.¹⁰⁵

Whether a national gang database is created from scratch or through aggregation of existing intelligence systems, its accuracy and utility will be no better than the data gathered at the state

100. S.132 § 304(b)(2)(A).

101. *See supra* Part II.C.

102. S.132 § 304(b)(2)(B).

103. S.456 § 304(b)(2)(C).

104. S.456 § 304(b)(2)(D).

105. Should the GAP Act be enacted as law, the Attorney General could implement the guidelines proposed in Part V, *infra*. While this path is undesirable for many reasons discussed in this Note, strong federal guidelines would become even more important in the event that the National Gang Activity Database is created.

and local levels.¹⁰⁶ Potential benefits of a national database include increased and more efficient collaboration among local law enforcement agencies, increased resources to target and reduce gang activity, and uniformity of documentation practices. In order to realize these benefits, legislation and the corresponding policies must be crafted to avoid problems present at the local level.¹⁰⁷ These concerns include vagueness, subjectivity, and other constitutional and legal issues.¹⁰⁸ Consolidation of databases at the national level could also subject wrongly-documented individuals to harsher treatment and may mischaracterize gang problems on a larger scale through aggregation of poorly-collected data.¹⁰⁹

IV. GANG DATABASES: INSTITUTIONAL AND INDIVIDUAL CONCERNS

Law enforcement officials use gang databases to locate suspected or known offenders, estimate the extent of their community's gang problem, and measure the effectiveness of anti-gang initiatives.¹¹⁰ The data can also be useful in resource allocation and policy making at the local and national levels.¹¹¹ Naturally, benefits of intelligence gathering depend on the quality and accuracy of data collection. While law enforcement agencies tout databases as useful for attacking gang problems, other advocates doubt the accuracy or effectiveness of data gathering in this area.¹¹² Some critics also charge that content is intentionally ma-

106. Rep. Buchanan's bill, which would amend existing violent crime legislation "to fund technology, equipment, and training for prosecutors and law enforcement in order to increase accurate identification of gang members and violent offenders, and to maintain databases with such information to facilitate coordination among law enforcement and prosecutors," may be a better and more constrained option. H.R. 3922 110th Cong. § 7(a)(6) (2007). To date, there is relatively little information on this bill or how it would be implemented.

107. See *infra* Part V.

108. See *infra* Part IV.

109. For a discussion of local measurement problems, see G. David Curry, James C. Howell & Cheryl L. Maxson, *Youth Gang Homicides in the United States in the 1990s*, in *RESPONDING TO GANGS: EVALUATION AND RESEARCH* 109, 115 (Winifred L. Reed & Scott H. Decker, eds., 2002), available at <http://www.ncjrs.gov/pdffiles1/nij/190351.pdf>. See *infra* Part IV.

110. Katz, *supra* note 1, at 486.

111. *Id.*

112. GANG WARS, *supra* note 2, at 43–44.

nipulated by police units for political or financial gain.¹¹³ At least one jurisdiction has shut down its gang database out of concern that civil rights were being violated.¹¹⁴

This Part examines the legal, institutional and individual consequences of maintaining a gang database. As with all criminal databases, the best models require balancing institutional and societal gains against risks to individual rights.

A. CONSTITUTIONAL QUESTIONS

Most constitutional challenges relating to gang activities have dealt with anti-loitering ordinances and other similar legislation. Challenges to such legislation have been premised on vagueness, the Equal Protection Clause, the right to freedom of association, and Procedural Due Process. Although there is little judicial precedent in the area of criminal databases, there are similar issues as to the constitutionality of gang legislation and databases.¹¹⁵ Constitutional questions stem from both statutory language and application of database policies by law enforcement and courts.¹¹⁶

One Due Process criticism of gang databases is that the definitions and criteria used to identify suspected gang members are unconstitutionally vague. The Supreme Court first addressed vagueness as applied to gang membership in *Lanzetta v. New Jersey*, when a defendant successfully challenged his conviction under a state anti-vagrancy statute.¹¹⁷ The Court found the New Jersey statute violated Due Process, because the phrase “known to be a member” was inadequately defined.¹¹⁸ More recently, in

113. Katz, *supra* note 1, at 486.

114. Oregon shut down its statewide gang database in the late 1990s “when the state legislature determined that intelligence gathering violated civil rights.” Ruth Liao & Dennis Thompson, *Gang Activity Resurges in Salem Area*, STATESMAN J. (Salem, Or.), Nov. 11, 2007.

115. See generally Baker, *supra* note 34; GANG WARS, *supra* note 2; Wright, *supra* note 34.

116. See generally Baker, *supra* note 34; GANG WARS, *supra* note 2; Wright, *supra* note 34.

117. 306 U.S. 451 (1939). The New Jersey statute punished “any person not engaged in lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other state.” *Id.* at 452.

118. “The Supreme Court found two fatal problems with this term: The first was whether the word ‘known’ required actual membership or whether reputed membership

City of Chicago v. Morales, the Supreme Court found that Chicago's definition of loitering was void for vagueness because it gave police officers absolute discretion to define loitering.¹¹⁹

A degree of vagueness in gang database statutes can be defended on the basis of necessity. Given that a wide range of behaviors may evidence gang membership, general language and criteria empower law enforcement to tailor gang database laws to their needs. Even under *Morales*, gang legislation is likely to survive a constitutional challenge for vagueness so long as police are not given "absolute discretion to determine what activities constitute" gang membership.¹²⁰ Still, there are tenable arguments that the loose definitions and criteria found in most gang legislation, which leave much discretion to localities, are still too vague to provide notice to citizens or to be employed by courts adjudicating alleged gang members.

The *Morales* Court also failed to address a related vagueness argument – that application of anti-loitering or anti-gang statutes may be arbitrary and discriminatory in practice. This raises both Due Process and Equal Protection concerns. The solution employed by Chicago after *Morales* demonstrates the problem. To cure the anti-loitering legislation, city officials identified high crime areas, or "hot spots", where police were entitled to order people to disperse if they suspected narcotics or gang-related activities.¹²¹ Rather than eliminating the discretionary problem, the new ordinance merely concentrated unfettered police discretion in certain geographic areas. Given that the targeted areas tended to be those heavily populated by minorities, application of

was sufficient; and second, the statute failed to indicate 'what constitutes membership or how one may join' a gang." Baker, *supra* note 34, at 107.

119. 527 U.S. 41 (1999). The Chicago ordinance stated:

[W]henever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section . . . Chicago Municipal Code § 8-4-015.

Id. at 48 n.2. The STEP Act, which lacks specific definitions of what makes a person a "gang member", has also been challenged, albeit unsuccessfully, for vagueness. *People v. Green*, 278 Cal. Rptr. 140 (Cal. Ct. App. 1991).

120. Bjerregaard, *supra* note 8, at 179 (quoting *Morales*, 527 U.S. 41).

121. Gary Washburn & Eric Ferkenhoff, *City Targets 86 Hot Spots for Gangs, Keeps List Secret*, CHI. TRIB., Aug. 23, 2000, at A1.

the revised law may violate Equal Protection.¹²² Gang databases, which are comprised primarily of minorities, could face similar challenges because they base documentation on physical traits and activities that, while potentially indicative of gang membership, may also be innocuous youth behavior.¹²³

Gang databases may also interfere with an individual's First Amendment Freedom of Association.¹²⁴ Since a person may be documented for affiliating with other known or suspected gang members, he may be targeted as a suspect before committing any criminal act. Using a "guilt by association" standard can have the effect of sweeping entire neighborhoods into a gang database.¹²⁵ This effect is felt disproportionately by minority populations due to geographic targeting of anti-gang efforts. In certain localities, police tend to document minorities for behaviors that, if observed among members of the majority population, are considered innocuous.¹²⁶ These patterns could, again, create Equal Protection problems.¹²⁷

Few jurisdictions require notice or judicial review before an individual is entered into a gang database.¹²⁸ Given that a person

122. Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 103 (2002).

123. National Youth Gang Center, National Youth Gang Survey Analysis (2007), <http://www.iir.com/nygc/nygsa/demographics.htm#anchorregm> (showing that blacks and Hispanics comprise the vast majority of reported gang populations, about 45% and 35% respectively, and that these figures have increased in recent years).

124. "In *Scales v. United States*, the Supreme Court upheld the conviction of a defendant accused of violating the 'membership clause' of the Smith Act by actively participating in American Communist Party activities. The Supreme Court held that the Constitution permits punishment of membership in or association with an organization when the defendant's involvement in the organization is more than nominal, passive, or theoretical; when the organization has a criminal purpose or goal which is known to the defendant; and when the defendant intends to further the criminal purpose of the organization." Baker, *supra* note 34, at 112.

125. GANG WARS, *supra* note 2, at 29.

126. See generally Brian W. Ludeke, *Malibu Locals Only: "Boys Will Be Boys," or Dangerous Street Gang? Why the Criminal Justice System's Failure to Properly Identify Suburban Gangs Hurts Efforts to Fight Gangs*, 43 CAL. W. L. REV. 309 (2007) (describing the failure of Malibu police to address suburban gang activities in the same way as inner city minorities).

127. See generally Ludeke, *supra* note 126; Strosnider, *supra* note 122.

128. A listing of gang database legislation in six states indicates that none require notice or judicial review, and only one (Texas) gives local jurisdictions the option of notifying parents when their child has been documented. National Youth Gang Center, *Gang Related Legislation by Subject* (2008), http://www.iir.com/nygc/gang-legis/gang_databases.htm.

can be documented without being convicted of any crime, some have argued that such documentation procedures fail to satisfy Procedural Due Process.¹²⁹ One scholar has argued that documentation itself deprives individuals of a liberty interest.¹³⁰ He proposes that courts apply a *Mathews*-type balancing test to determine whether a locality's interest in accuracy multiplied by the risks to the individual is greater or less than the burden of improving gang databases and documentation procedures.¹³¹ Although this Note does not assert that mere entry into a database is a Due Process violation, arguments put forward in this area demonstrate ways in which documentation practices are improper and inadequate.

For any of the above Constitutional claims to be successful with respect to gang databases, a key question will be whether documentation changes the legal status of individuals or minority populations. Although anti-loitering and anti-gang jurisprudence is informative in Constitutional analysis, the consequences of gang documentation should be distinguished. Rather than being ordered to disperse, individuals documented as gang members may experience more severe consequences. In crafting Constitutional arguments, advocates for database reform should explore a number of areas to prove change in legal status. Once documented, are individuals more likely to be charged with a crime? Are reputational and social effects alone substantial enough to establish violation of a Constitutional right? Constitutional questions in this area remain largely untested.

B. INSTITUTIONAL FLAWS

Before critiquing institutional flaws in the use of gang databases, several benefits of documentation should be recognized. Identification of gang-related crimes and gang members, if conducted properly, may provide substantial benefits to a region,

129. Baker, *supra* note 34, at 112–122; Wright, *supra* note 34, at 131.

130. Wright, *supra* note 34, at 131–137.

131. “The *Mathews* test requires courts to balance (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value of additional safeguards; and (3) the government's interests, including any administrative burdens that additional procedural safeguards would pose.” *Id.* at 137. See also *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

such as assistance in allocating resources and locating persons of interest. Further, if databases help to lower gang membership, this may in turn lead to decreased rates of violent crime.¹³² Assuming that such a link exists, however, there remain questions as to whether targeting gangs is the fairest and most efficient means of reducing violent crime. The accuracy and utility of gang databases hinges on the adequacy of definitions, the documentation process and administrative review.¹³³ Failure in one or more of these areas can lead to poor resource allocation and may handicap law enforcement efforts.

Many localities rely on law enforcement to identify criteria for documentation, initiate the documentation process, and review and approve reports for entry into the gang database. There are several problems with this system. First, there are natural inconsistencies between jurisdictions, both in policies for documenting gang members and in how these policies are carried out.¹³⁴ Patrol officers, who typically initiate the documentation process, generally lack knowledge of official definitions and policies and may rely on other factors, including their own prejudices, in singling out a suspected gang member.¹³⁵ Racial profiling is a major concern in this respect. Some have argued that the police focus disproportionately on certain neighborhoods and that officers merely identify the minority male youths.¹³⁶

Second, and related to the first point, documentation procedures in most localities are characterized by high levels of discretion in identification, review, and processing of information.¹³⁷ Naturally, proper documentation requires some form of review for consistency and accuracy. Ideally, review should take place at each level of the documentation process and should involve both in-house and non-agency actors.¹³⁸ Unfortunately, due to time,

132. NAGIA REPORT, *supra* note 5, at 36.

133. *See supra* Part III.

134. ADVANCEMENT PROJECT, *supra* note 48, at 7. Inconsistencies in criteria are discussed in Part III, *supra*.

135. Katz, Webb & Schaeffer, *supra* note 3, at 433–34.

136. GANG WARS, *supra* note 2, at 43.

137. Katz, *supra* note 1, at 487.

138. For an example of extensive review procedures, see *id.* at 495.

resource and communication constraints, local agencies do not appear to be putting such safeguards into practice.¹³⁹

Proper purging procedures are also needed to maintain the quality and accuracy of gang databases, particularly with respect to individuals. Youth surveys indicate that gang membership is constantly in flux, with some teens joining and leaving a gang in a matter of several months.¹⁴⁰ Most jurisdictions only require purging of inactive gang members every two to five years, but audits of current databases show that, even when these minimal maintenance procedures are in place, they are rarely followed.¹⁴¹ Thus, many databases contain files that are outdated or incomplete and “policies linking legal action to an individual’s perceived status may erroneously criminalize that individual.”¹⁴²

Finally, whereas most criticisms turn on the inadequacy of gang database protocol, there may be more invidious motives at play. Investigation of an LAPD anti-gang unit revealed that officers had planted evidence on suspects and celebrated wounding or killing of suspected gang members.¹⁴³ Such extreme abuses of power may be anomalous, but, given that funding grants and other incentives are tied to a jurisdiction’s ability to prove that it has a gang problem, there remain obvious incentives for over-inclusiveness.¹⁴⁴ Vague definitions and inconsistent criteria increase manipulability of gang data and make it easier for reviewers to turn a blind eye.

139. ADVANCEMENT PROJECT, *supra* note 48, at 46; Katz, *supra* note 1, at 499; Katz, Webb & Schaeffer, *supra* note 3, at 433–4.

140. GANG WARS, *supra* note 2, at 46–50 (discussing surveys in multiple jurisdictions that indicate at least 50 percent of gang members leave after a year or less).

141. Katz, *supra* note 1, at 512; Katz, Webb & Schaeffer, *supra* note 3, at 418; Wright, *supra* note 34, at 123.

142. GANG WARS, *supra* note 2, at 49–50.

143. *Id.* at 28 (discussing the LAPD’s Community Resources Against Street Hoodlums (“CRASH”) program, investigation of which led to 100 case dismissals in Los Angeles).

144. Katz, *supra* note 1, at 489. “[F]or local agencies to have access to some forms of federal money they must demonstrate that they have a gang problem within their community . . . any agency seeking federal funds may have a vested interest in “discovering” gang members and gang activity.” *Id.* (citing Richard C. McCorkle and Terance D. Miethe, *The Political and Organizational Response to Gangs: An Examination of a “Moral Panic” in Nevada*, 15 JUST. Q. 41 (1998)). See also Zatz, *supra* note 8.

C. RISKS TO INDIVIDUALS

Questions about accuracy and propriety of database content are particularly alarming given serious legal, reputational and social implications that documentation can have for an individual. Persons known or suspected to be in a gang appear to receive harsher treatment at every stage of investigation and adjudication. Law enforcement officials use lists of suspected gang members and known associates in criminal investigations,¹⁴⁵ and they often conduct gang sweeps in neighborhoods known for high gang populations.¹⁴⁶ Once added to a gang database, documented gang members, and those living in gang-dense neighborhoods, are more likely to be charged with a crime.¹⁴⁷ Analyses of these charges reveal that while arrests of suspected gang members increase when they are targeted, arrests are typically for drug possession or other misdemeanor charges – rarely for violent crimes or weapon charges that anti-gang programs are created to eradicate.¹⁴⁸

Once charged, an individual faces an increased chance of conviction, given the likely event that his gang member status is admitted into evidence.¹⁴⁹ Some jurisdictions have special gang prosecution units that forbid plea bargains and require prosecutors to seek the highest penalty possible.¹⁵⁰ At least 23 states also impose increased mandatory sentences for gang crimes,¹⁵¹ and there is currently a 10-year sentence enhancement in the federal

145. NAGIA REPORT, *supra* note 5, at 16; Brannon, *supra* note 82, at 34.

146. GANG WARS, *supra* note 2, at 23, 26, 29, 73 (discussing how police departments in Chicago, Dallas, Detroit, Los Angeles and St. Louis are among those documented as conducting curfew and truancy sweeps in targeted neighborhoods).

147. See, e.g., GANG WARS, *supra* note 2, at 73 (noting that more than half of the “consent stops” during gang sweeps resulted in a criminal charge); *Id.* at 77 (describing how of the 1,250 people taken into custody during neighborhood sweeps in Boston over an 8-month period, the vast majority were charged with trespassing, drug possession, motor vehicle violations, and other misdemeanors); *Id.* at 79–80 (“targeting” of suspected gang members San Diego resulted in “special enforcement operations by law enforcement” and “stepped up prosecution”).

148. Decker, *supra* note 14, at 14; GANG WARS, *supra* note 2, at 77.

149. John E. Theuman, Annotation, *Admissibility of Evidence of Accused's Membership in Gang*, 39 A.L.R.4th 775 § 1 (2008) (state and federal courts have found evidence regarding gang membership relevant and probative, despite prejudicial effect).

150. Katz, *supra* note 1, at 490.

151. National Youth Gang Center, *Enhanced Penalties – Sentencing* (2008), http://www.iir.com/nygc/gang-legis/enhanced_penalties.htm (last visited Jan. 31, 2009).

system.¹⁵² Four states impose the death penalty for gang-related homicide.¹⁵³ Thus, even when permitted to offer plea bargains, prosecutors are armed with increased power. For cases that do go to trial, a documented gang member is more likely to be remanded while awaiting trial.¹⁵⁴ If that person is a juvenile, he or she is more likely to be tried as an adult, which has been shown to increase recidivism.¹⁵⁵ Courts may impose special probationary conditions, forbidding gang members from associating with other known or suspected members, which means that a defendant may be recharged if found associating with other suspected gang members in a subsequent neighborhood sweep.¹⁵⁶

Other potential criminal implications are illustrated by the California STEP Act, which criminalizes any person who “actively participates in any criminal street gang, with knowledge that its members engage in or have engaged in a pattern of criminal activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.”¹⁵⁷ The California Supreme Court has defined active participation in a gang as that which is “more than nominal or passive.”¹⁵⁸ As discussed above, the STEP Act does not define “gang member” or “gang membership,” which has led some to criticize the act for vague-

152. 18 U.S.C. § 521(b) (2006).

153. CAL. PENAL CODE § 190.2(22) (West 1999); FLA. STAT. ANN. § 921.141(5)(n) (West 2001); IND. CODE ANN. § 35-50-2-9(b)(1)(I) (West 2004); MO. ANN. STAT. § 565.032 (2)(17) (West 1999). Two scholars have questioned whether these statutes pass Furman’s narrowing requirements. H. Mitchell Caldwell & Daryl Fisher-Ogden, *Stalking the Jets and the Sharks: Exploring the Constitutionality of the Gang Death Penalty Enhancer*, 12 GEO. MASON L. REV. 601, 602 (2004).

154. Katz, Webb & Schaeffer, *supra* note 3, at 419.

155. “For years now, every study of juveniles tried as adults has shown that juveniles commit more crimes, more violent crimes in particular, when they are released, if they are treated as adults.” *Gang Deterrence and Community Protection Act of 2005: Hearing on H.R. 1279 Before the Subcomm. on Crime, Terrorism, and Homeland Sec.*, 109th Cong. 4 (2005) (statement of Rep. Robert Scott, Member, House Comm. on the Judiciary).

156. To conserve law enforcement and prosecutorial resources, some jurisdictions have crafted programs to focus on gang members on probation. *See, e.g.*, Richard C. McCorkle & Terance D. Miethe, *Evaluating Nevada’s Antigang Legislation and Gang Prosecution Units*, in RESPONDING TO GANGS: EVALUATION AND RESEARCH 2, 168 (Winifred L. Reed & Scott H. Decker, eds., 2002), available at <http://www.ncjrs.gov/pdffiles1/nij/190351.pdf>; Melton & Pennell, *supra* note 40, at 196.

157. CAL. PENAL CODE § 186.22(a) (West 2007).

158. *People v. Castenada*, 23 Cal. 4th 743, 752 (2000). Although the GAP Act would only punish criminal acts in furtherance of a gang’s purposes, the legislation lacks specific criteria and may not differ dramatically from the STEP Act in practice. *See supra* Part III.

ness or for creating guilt by association.¹⁵⁹ When used in combination with other measures enacted in California, suspected gang members, particularly youth, may “receive more severe treatment at every stage of the adjudication process.”¹⁶⁰

Inadequate review and purging procedures can lead to serious and inconsistent outcomes for individuals. Given that many jurisdictions fail to regularly update or purge files, once an individual has been documented, he or she may be charged with a gang-related crime for acts occurring long after membership is terminated.¹⁶¹ Worse, that individual might be charged with participation in a gang crime for merely being present at the scene of an incident involving gang members.¹⁶²

States and localities may also issue civil injunctions, barring documented gang members from associating with one another or from attending public events.¹⁶³ A Maryland county's policy of banning suspected gang members from attending the county fair prompted a police investigation into the local gang database and police policies.¹⁶⁴ Although the City of Los Angeles recently amended its Civil Gang Injunction policies,¹⁶⁵ the California Supreme Court has upheld civil injunction policies elsewhere.¹⁶⁶ En-

159. See *supra* Part IV.A.

160. “‘Three Strikes’ law and Proposition 21 . . . made any felony committed ‘on behalf of a gang’ a strike and provides prosecutors with legal authority to file charges against youths as young as 14 years old directly in adult court, without a fitness hearing before a judge.” GANG WARS, *supra* note 2, at 28.

161. For examples of interesting hypothetical situations, see Wright, *supra* note 34, at 127–28.

162. *Id.*

163. Constitutionality of these injunctions is questionable following the decision in *City of Chicago v. Morales*, 527 U.S. 41 (1999). See also *supra* Part IV.A. For additional discussion, see generally Amanda S. Rile, *Beep! You're Guilty! Constitutionality of Pager Ban Provisions in Gang Injunctions*, 31 W. ST. U. L. REV. 79 (Fall 2003) (discussing the LAPD gang injunction policy that regulated use of communications devices as a means of targeting potential gang activity).

164. Sebastian Montes, *Fewer Gang Members Banned from County Fair: Of 51 People Who Were Issued Trespass Notices, 14 Had Gang Affiliations*, Gazette.net: Maryland Community Newspapers Online, Oct. 3, 2007, http://gazette.net/stories/100307/gaitnew214230_32374.shtml (last visited Dec. 22, 2008).

165. In 2007, the Los Angeles City Attorney, facing intense political and media scrutiny over database procedures, changed city policies to require notice and a hearing before a person can be added to an injunction list. Names also will be automatically reviewed every three years. GANG WARS, *supra* note 2, at 29. For discussion of pre-2007 injunction policies, see Wright, *supra* note 34, at 129–30.

166. In *People ex rel Gallo v. Acuna*, the California Supreme Court upheld a San Jose anti-gang injunction against vagueness and guilt by association challenges. The injunction prohibited documented members of the “VST” gang from “standing, sitting, walking, driv-

forcement of civil injunctions may result in increased incidents of police violence against known or suspected gang members.¹⁶⁷

Finally, risks of police and gang member violence can create social and psychological problems, particularly for minorities and those living in neighborhoods with high gang populations.¹⁶⁸ Youth who lack positive adult role models are at the highest risk for gang involvement.¹⁶⁹ Without family or other support, individuals in gang-prone neighborhoods often join out of social pressure or concern for personal safety.¹⁷⁰

Viewed from one perspective, these risks make gang-prevention by law enforcement all the more necessary. On the other hand, targeting gangs through suppression efforts may increase an “us [vs.] them” mentality already prevalent in many minority neighborhoods, where fear and resentment of police are commonplace.¹⁷¹ Given the heavily minority composition of gang databases, intelligence gathering can exacerbate this effect.¹⁷² Schools and employers are sometimes notified when a student is documented and there is heightened suspicion with respect to that person’s friends.¹⁷³ Certain populations come to see themselves as targeted, or victimized, by the police, which can increase gang cohesion. For actual gang members, there may be less incentive to quit. For those not already in a gang, but who fear that police believe they are, the protective benefits of joining may appear to outweigh the risks.¹⁷⁴

ing, gathering or appearing anywhere in public view with any other defendant herein, or with any other known ‘VST’ . . . or ‘VSL’ . . . member.” 929 P.2d 596, 608-09 (Cal. 1997). The Court did not address Due Process concerns in its decision. Matthew Mickle Werdegard, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 412 (1999).

167. Katz, Webb & Schaeffer, *supra* note 3, at 418.

168. See generally YABLONSKY, *supra* note 6.

169. *Id.* at 9–10.

170. GANG WARS, *supra* note 2, at 45–50; YABLONSKY, *supra* note 6, at 9–10.

171. Bjerregard, *supra* note 8, at 176; GANG WARS, *supra* note 2, at 5–6. One California agency has been criticized for targeting minority populations while refusing to classify Malibu Locals Only (“MLO”), a white, suburban group responsible for several violent attacks, as a street gang. See generally Ludeke, *supra* note 126.

172. Surveys have shown that Calgang has a 92% minority population and roughly two-thirds of individuals in Chicago’s gang database are black. Bjerregard, *supra* note 8, at 177–8.

173. GANG WARS, *supra* note 2, at 49.

174. “[L]eaving the gang may require ‘rejecting one’s friends and peers.’ Yet mainstream social institutions are reluctant to embrace former gang members. Thus former gang members experience the worst of both worlds.” *Id.* at 49.

While a police response may be the only option in certain gang incidents, prevention and intervention programs, coordinated by social services organizations rather than law enforcement, may lead to better outcomes for individuals and communities.¹⁷⁵ Gang fighting efforts in California, known for having the highest national levels of gang activity, are heavily focused on suppression.¹⁷⁶ Recent national trends also favor suppression over social work-based or other outreach programs popular in the 1960s and 70s. Based on results and gang rate statistics over the past four decades, however, there is little data that supports the suppression approach.¹⁷⁷ Particularly when compared to prevention and intervention-focused programs in New York and Chicago, suppression tactics appear relatively unsuccessful at decreasing gang membership or violent crime.¹⁷⁸

V. THE FUTURE OF GANG DATABASES: PROPOSED SOLUTION

*After a quarter century of a multi-billion dollar war on gangs, there are six times as many gangs and at least double the number of gang members in the region. Suppression alone — and untargeted suppression in particular — cannot solve this problem. Law enforcement officials now agree that they cannot arrest their way out of the gang violence crisis and that their crime suppression efforts must be linked to competent prevention, intervention, and community-stabilizing investment strategies.*¹⁷⁹

Gang databases have potential to assist law enforcement and local leaders in understanding and targeting local gangs.¹⁸⁰ Despite these potential benefits, current methods of populating and

175. See generally ADVANCEMENT PROJECT, *supra* note 48; *Gang Deterrence and Community Protection Act of 2005: Hearing on H.R. 1279 Before the Subcomm. on Crime, Terrorism, and Homeland Security*, 109th Cong. (2005) (statement of Rep. Robert Scott, Member, House Comm. On the Judiciary); YABLONSKY, *supra* note 6.

176. “A recent analysis concluded that two-thirds of resources expended on gang reduction in Los Angeles have gone to suppression activities.” GANG WARS, *supra* note 2, at 6.

177. A study of four cities determined that gang units were formed in response to “political, public, and media pressure” and that “almost no one other than the gang unit officers themselves seemed to believe that gang unit suppression efforts were effective at reducing the communities’ gang problems.” *Id.* at 5. Gang officers were poorly trained and their units became isolated from host agencies and community residents. *Id.*

178. *Id.* at 13–30.

179. ADVANCEMENT PROJECT, *supra* note 48, at 1 (criticizing gang suppression tactics in California).

180. NAGIA REPORT, *supra* note 5, at 54.

maintaining gang databases are of questionable reliability and utility. Even where official criteria and processes are established, implementation and oversight are lacking.

The question then becomes whether and how federal involvement in the fight against gangs can be most effective. This Note's proposal provides for procedural and substantive gang intelligence reforms through top-down policy directives and bottom-up implementation. This proposal begins with the proposition that federal funding to combat criminal street gangs, an area traditionally reserved for local law enforcement, is ideally employed to develop best practices and encourage reform.¹⁸¹ Thus, the best path for gang database reform is one in which the federal government provides guidelines and feedback through aggregation and analysis of gang trends, rather than actively tracking and prosecuting individual gang incidents and members. This proposal then provides documentation guidelines, to be developed and disseminated by federal officials and implemented at the local level.

A. THE PATH TO REFORM

Given the current multi-leveled system of gang databases, the proposed national gang database could proceed along one of three general paths. First, in keeping with the GAP Act's proposal, the database could be a central repository for aggregate and individual gang data from local, state and federal law enforcement agencies. The rationale for such an approach, which is the basis for the GAP Act and other current federal projects, is that local authorities have been unable to tackle gangs on their own.¹⁸² Thus,

181. This Note recognizes the increasing scope of federal criminal law in many areas, including violent crime. It is beyond the scope of this Note to address the various political and policy reasons for expansions in other areas, but this Note takes the position that the nature of criminal street gangs and the crimes they commit are such that prosecution of these gangs is best left to local police and elected officials who are in the best position to tailor solutions fitting their cities' problems.

182. 153 Cong. Rec. S1435 (daily ed. Jan. 31, 2007) (statement of Sen. Feinstein):
Our national gang problem is immense and growing, and it is not going away. Our cities and States need help. The many law enforcement officers that have spoken to me and others in my office say one thing clearly – short-term infusions are great, but what they really need is a long-term Federal commitment to combat gang violence. A massive report just prepared for the City of Los Angeles

federal legislators are heeding the call to take a more proactive, hands-on role in the fight against gangs.

If local efforts are failing, however, it is unclear why a national database modeled on these programs will be more effective. This first option would be expensive and time-consuming. In addition to using up federal resources, mandated information sharing and database consolidation could also burden state and local budgets and disrupt the allocation of police resources. Given that the FBI and other federal agencies already track suspected terrorists and extremely violent gangs, inundating federal databases with files on local gang members might distract from focusing on the most dangerous, widespread activities. Most importantly, however, are the risks of amplifying faulty data at the national level, exposing low-level gang members to federal prosecution and higher penalties.

A second, better option would be for the national gang database to track national trends in gang activity, mirroring the aggregate GITS model.¹⁸³ A framework for such a project already exists in the NAGIA's National Gang Threat Assessment, which compiles information from 15 state and regional gang investigators associations throughout the country and analyzes regional and national trends in gang activity.¹⁸⁴ The NAGIA pools data from at least six different sources to compile its report.¹⁸⁵ A more complete picture of the national gang problem will require information from most, if not all, state and local law enforcement agencies. This option thus creates similar resource and funding issues as in the first option. The trend-tracking model also requires federal guidelines and costly oversight, though the risk of error in federal investigations would not be as high given that individuals would not be listed in the system.

even suggested that what is needed is a "Marshal Plan" initiative to combat gang violence.

183. See *supra* Part II.C.

184. The most recent report was published in 2005. NAGIA REPORT, *supra* note 5.

185. Surveys were mailed to hundreds of investigators who are members of the 15 state and regional gang investigators associations that comprise the NAGIA. *Id.* at iv. These responses from local law enforcement officers form the basis for the assessment. *Id.* To this information on gang activity was added intelligence generated by the Federal Bureau of Investigation, National Drug Intelligence Center ("NDIC"), and two of the Regional Information Sharing Systems® ("RISS") centers: the Middle Atlantic-Great Lakes Organized Crime Law Enforcement Network® and the New England State Police Information Network®. *Id.*

Finally, optimally, Congress should refrain from creating another centralized database while working with localities to improve database procedures. As it has done with other criminal justice initiatives, the Office of Justice Programs should develop and issue guidelines for improved gang intelligence gathering.¹⁸⁶ A portion of the federal funds saved by not sifting through data at the national level could be given to local law enforcement to facilitate this effort.¹⁸⁷ Since many jurisdictions already receive some federal funding to target violent crime, the federal government should also mandate state and local compliance within a number of years to ensure renewed funding for gang suppression programs.¹⁸⁸ Given current incentives to overstate gang problems and manipulate data, the federal government should restructure oversight of grant and funding programs to create some separation between those reviewing data and the agencies actually receiving federal money.

B. IMPROVING DOCUMENTATION CRITERIA & PROCESS

The federal government has already stepped up oversight of other criminal justice programs receiving federal funds. One example is the Coverdell Program, which was established to improve standards in state forensic crime labs.¹⁸⁹ Another program,

186. See *infra* Part V.B.

187. Although it is unclear exactly what portion of S.456 funds would be reserved for the National Gang Activity Database, the bill currently authorizes \$170 million per year for Department of Justice gang programs over the next four years. By contrast, the Coverdell crime labs program has required only \$15 to 16 million in annual state and local grants in the two years it has been in place. See *infra* note 189.

188. This might be an unpopular solution, but, by continuing funding for prevention programs irrespective of intelligence gathering procedures, federal legislation could have the double effect of protecting individual rights and encouraging localities to focus on prevention efforts that often go by the wayside when budgets are cut. For suggested prevention efforts or “positive public safety strategies”, see ADVANCEMENT PROJECT, *supra* note 48, at 46,75–76; Finn-Aage Esbensen, et al., *National Evaluation of the Gang Resistance Education and Training (G.R.E.A.T.) Program*, in RESPONDING TO GANGS: EVALUATION AND RESEARCH 139 (Winifred L. Reed & Scott H. Decker, eds., 2002), available at <http://www.ncjrs.gov/pdffiles1/nij/190351.pdf> (citing favorable results from a “school-based program for middle school students . . . designed to help them avoid peer pressure to join gangs through cultivation of such life skills as social competence, problem solving, and responsibility”); GANG WARS, *supra* note 2, at 6–7.

189. Under the Coverdell Program, distribution of federal funds is contingent on states’ proving that adequate institutions and external safeguards will be established to provide oversight of forensic laboratories:

Community Oriented Policing Systems (“COPS”), encourages improved community-police relationships and prevention activities.¹⁹⁰ Though relatively new, these programs could serve as models for a gang database reform program that emphasizes improved standards and processes.

The internal reforms suggested below, to be fleshed out at the federal level but implemented by state and local actors, address many flaws in the documentation procedures discussed in Parts II and IV. Taken in part or in their entirety, these changes will safeguard individual rights while improving accuracy, efficiency, and utility of gang database documentation. This Note advocates the third option discussed above, maintaining gang databases at the local level with federal guidelines for reform, but these suggestions could be employed to improve intelligence gathering in any of the scenarios described above.

The Department of Justice (Department) Paul Coverdell Forensic Science Improvement Grants Program (Coverdell Program) provides funds to state and local governments to improve the timeliness and quality of forensic science and medical examiner services and to eliminate backlogs in the analysis of forensic evidence. The National Institute of Justice (NIJ), under the legal and fiscal oversight of the Office of Justice Programs (OJP), distributed almost \$15 million in fiscal year (FY) 2006 Coverdell Program grants. In FY 2007, NIJ distributed almost \$16.5 million in Coverdell Program grants.

EVALUATION AND INSPECTION DIVISION, OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, *REVIEW OF THE OFFICE OF JUSTICE PROGRAMS' PAUL COVERDELL FORENSIC SCIENCE IMPROVEMENT GRANTS PROGRAM* (Jan. 2008), available at <http://www.usdoj.gov/oig/reports/OJP/e0801/final.pdf>.

190. It might also be possible to expand COPS to include a gang database reform project. COPS was created through the Violent Crime Control and Law Enforcement Act of 1994:

[T]he mission of the COPS Office is to advance the practice of community policing as an effective strategy to improve public safety. Moving from a reactive to proactive role, community policing represents a shift from more traditional law enforcement practices. By addressing the root causes of criminal and disorderly behavior, rather than simply responding to crimes once they have been committed, community policing concentrates on preventing both crime and the atmosphere of fear it creates. Additionally, community policing encourages the use of crime-fighting technology and operational strategies and the development of mutually beneficial relationships between law enforcement and the community. By earning the trust of the members of their communities and making those individuals stakeholders in their own safety, law enforcement can better understand and address the community's needs, and the factors that contribute to crime.

Office of Community Oriented Policing Services, U.S. Department of Justice, *COPS Office: About Us*, <http://www.cops.usdoj.gov/Default.asp?Item=35> (last visited Jan. 31, 2009).

1. *Definitions*

Legislation and law enforcement policies should be revised to improve definitions of “gang”, “gang member”, or “gang-related crime.” Definitions, which can have a dramatic impact on the scope and direction of gang prosecutions,¹⁹¹ should be specific and target the most dangerous, highly organized groups.¹⁹² Although some definitions have been suggested,¹⁹³ creation of more precise definitions will not require universal language across all jurisdictions.

Rather than mandating nationwide definitions, federal definitional guidelines should encourage localities to tailor documentation criteria to regional criminal activities. Federal guidelines should require “continuing criminal activity”¹⁹⁴ and have minimum standards for the specificity and dangerousness of such behavior. For example, sale or possession of controlled substances, without evidence of violence or other dangerous criminal activity, should not be sufficient to apply a gang label to a group or an individual.¹⁹⁵ Additionally, criteria that do not focus on criminal activity, such as “has been seen affiliating with gang members,” “has been photographed with gang members,” or “frequents gang areas,” should not suffice to document an individual.¹⁹⁶ Law enforcement officials are drawn to this type of language, however, because it permits them to exercise broad discretion in interacting with suspected gang members. Thus, while it is important

191. See generally Richard A. Ball & G. David Curry, *The Logic of Definitions in Criminology: Purposes and Methods for Defining “Gangs”*, 33 CRIMINOLOGY 225 (1995).

192. Katz, Webb & Schaeffer, *supra* note 3, at 414–15.

193. The NAGIA has suggested a definition for the term “gang” to facilitate work across jurisdictions:

Gang. A group or association of three or more persons who may have a common identifying sign, symbol, or name and who individually or collectively engage in, or have engaged in, criminal activity which creates an atmosphere of fear and intimidation. Criminal activity includes juvenile acts that, if committed by an adult, would be a crime.

NAGIA REPORT, *supra* note 5, at 54. Given the broad range of criminal activities and identifying criteria currently used by law enforcement, this very general language would do little to improve standards or protect individuals.

194. Brannon, *supra* note 82, at 2.

195. As noted in Part IV, neighborhood gang sweeps based on current targeting criteria tend to result in arrests for misdemeanors or other minor violations and have not been successful in targeting the most serious or dangerous gang activities.

196. GANG WARS, *supra* note 2, at 9.

not to create overly narrow definitions, federal guidelines must avoid police behavior that will single out individuals solely on the basis of appearance, geography or association. These types of law enforcement policies increase community tensions and lead to excessive reliance on law enforcement discretion.¹⁹⁷

2. Notice

In localities that use an individual documentation system, tracking suspected gang members or known associates, persons must be given notice when they have been documented. Opponents of this view may argue that the time and expense of providing notice to all who are documented would be excessive given that many entered into a gang database are never targeted by police or prosecuted. If other procedural safeguards, such as improved definitions and review, are implemented, notice might not be necessary or practical in all instances.

Where documentation has legal or social consequences, however, notification procedures should be implemented. For example, in areas where schools and employers are informed that a person is a suspected gang member, individuals and parents should also receive notification. Public “notification forums” should disseminate additional information on the implications of documentation and other gang crime laws in the locality. Individuals and parents could attend these meetings for the opportunity to ask questions.¹⁹⁸ Such forums may discourage gang members from engaging in criminal activities once aware of the harsher penalties they face. Group forums, as opposed to individual meetings, also save police time and resources, though it remains unclear whether alleged gang members or their families would be willing to participate in these public settings.

Where an individual’s gang member status will have criminal or civil consequences, documentation hearings are ideal, though

197. *See supra* Part IV.

198. *See generally*, Andrew Papachristos, Tracey Meares & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. OF EMPIRICAL LEGAL STUDIES 223 (2007) (describing Chicago’s Project Safe Neighborhoods, which instituted “offender notification meetings” to warn gun offenders of the implications should they choose to pick up a gun again). Preliminary assessments indicate that offenders who attended the meetings have had lower rates of recidivism.

expensive.¹⁹⁹ Such proceedings would encourage more rigorous enforcement of the review procedures discussed below. Hearings would allow removal of wrongly documented individuals from gang databases and prevent enhanced penalties or civil injunctions from being applied to them. Opportunities for notice should be balanced against state and city interests, such as protecting the confidentiality of police investigations. At the very least, however, if later charged with a crime, individuals should have adequate opportunities – besides trial – to dispute their gang member status.

3. *Documentation Review, Oversight & Purging*

Though many jurisdictions already have official documentation policies, these must be openly and regularly communicated to law enforcement. Gang policies should be incorporated into training for all officers, whether or not they are members of the local gang unit.²⁰⁰ Reforms to these policies should focus on process and how gang data is actually used by law enforcement and prosecutors. Written and open policies, containing rigorous documentation procedures, could improve public awareness about gang suppression and prevent racial or other profiling.²⁰¹ Federal funding could be used to study current procedural and institutional problems, but individual law enforcement agencies must ultimately address the changes and problems.²⁰²

The documentation process should include at least one level of independent review. A possible objection to this method is that the reviewer is unable to properly assess gut reactions by officers in the field, who may be better trained in dealing with gangs. Instinct would still come into play at the initial level, however, given the enormous discretion given to patrol officers. Thus, independent review from an objective source would balance against the instinctive, but potentially biased, decisions by officers in the field.²⁰³ A supervisor or agent not directly involved with gang unit

199. For an analysis of the costs and benefits of documentation hearings, see Wright, *supra* note 34.

200. Katz, *supra* note 1, at 497 (describing problems that arose when patrol officers were not provided adequate training from gang units within their departments).

201. *Id.*

202. Katz, Webb & Schaeffer, *supra* note 3, at 434–35.

203. *See supra* Part II.C.

activities should review and approve files before they are entered into the database. Ideally, each file on an individual will also be traceable to its original report and the officer who initiated documentation, facilitating review and documentation hearings.²⁰⁴ Finally, someone should regularly review and purge individual files if no subsequent reports are filed on a person. Database maintenance is particularly important for juveniles to ensure that they are given opportunities to succeed and overcome prior gang affiliation.

VI. CONCLUSION

Federal gang intelligence policies, rather than seeking the short-term goal of getting individuals into a database, should pursue the long-term objective of keeping them out of gangs. In addition to further research on gang intelligence policies, federal funds should be allocated to study several related questions. These include (i) empirical studies on the correlation between street gangs and violent crime, (ii) relative success of prevention, intervention and suppression efforts, and (iii) the impact of current incarceration and other punitive measures in preventing juvenile recidivism. Improved awareness in all of these areas may prevent current media and political manipulation of gang statistics used to garner support for suppression policies.

Given the sustained interest in enacting comprehensive gang legislation, federal legislators and agencies are unlikely to desist entirely from suppression policies. If trends over the past decade are any indication, we will also see a continued emphasis on intelligence gathering in criminal investigation and prosecutions. Rather than continuing down the current path, Congress should channel their legislative momentum to facilitate and improve local gang efforts, instead of spending additional money to incorporate flawed data and methodology into gang programs at the federal level.

204. This was a crucial element of GITS. Meeker et al., *supra* note 51, at 297.